United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7211

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARIO LUBRANO,

Plaintiff-Appellant,

—against—

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS
FILED
JUL 8 1977
DANIEL FIORARO, CLERK
SECOND CIRCUIT

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Issue

Whether, as a matter of law, a shipowner cannot be held liable for injury to a longshoreman employed by an independent contracting stevedore, which occurred after the November 26, 1972 effective date of amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, because a ship's officer did not somehow prohibit the longshoreman from obeying orders by the stevedore's superintendent and hatch boss to continue working despite the risk of an obvious danger known to everyone, which the shipowner was in process of rectifying.

Statement

The facts are adequately set forth in Judge Haight's opinion (67a, *et seq.*), with the following explication of who authoritatively said what.

Appellant Lubrano was a holdman in hatch boss Ashley's gang (13a-14a, 35a-37a). Ashley "was the only man who gave [Lubrano] orders, nobody else, just Ashley" (31a). Ashley took his orders from the stevedore superintendent and ship foreman Spano (14a, 32a, 36a, 50a).The holdmen asked Ashley, and Ashley asked Spano, and Spano asked a ship's officer for more dunnage (25a, 30a-31a, 41a-43a, 49a). The ship's officer replied that more dunnage had been ordered and the longshoremen would have to wait until it arrived (41a-42a, 49a). Spano then told Ashley to "Keep working, do the best you can", and Ashley relayed that order to the holdmen (25a, 31a, 50a-51a). The additional dunnage arrived after Lubrano's accident (44a, 51a).

Argument

> "* * * unless the trial judge thinks reasonable men could infer from the evidence a *greater likelihood* of negligence on the part of the defendant, the plaintiff has no right to go to the jury * * *." *Calvert* v. *Katy Taxi, Inc.,* 413 F. 2d 841, 844 (2 Cir. 1969).

> "'Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.'" *Radiation Dynamics, Inc.* v. *Goldmuntz,* 464 F. 2d 876, 887 (2 Cir. 1972).

Appellee Royal had no duty to direct or correct the way stevedore Northeast's employees stowed the drums of tallow. *Filipek* v. *Moore-McCormack Lines,* 258 F. 2d 734, 737 (2 Cir. 1958), cert. den. 359 U.S. 927 (1959); *Puddu* v. *Royal Netherlands Steamship Co.,* 303 F. 2d 752, 754 (2 Cir. 1962), cert. den. 371 U.S. 840 (1962); *Munoz* v. *Flota Merchante Grancolombiana,* —— F. 2d —— (2 Cir. 76-7519, 1977).

> "Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act * * * ; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work * * *." H.R. Rep. 92-1441, 92d Cong., 2d Sess., p. 6, 1972 U.S. Code Cong. and Adm. News, vol. 3, p. 4703; S. Rep. 92-1125, 92d Cong., 2d Sess., p. 10.

Northeast warranted to Royal that Northeast's employees would stow the tallow drums "properly and safely", *Italia Societa* v. *Oregon Stevedoring Co.,* 376 U.S. 315, 318 (1964), and that as "a specialist in stevedoring" who "was in a far better position than the shipowner to avoid the accident", *ibid.,* pp. 322, 323, and whom Royal was compelled to hire by union regulations, *Munoz* v. *Flota Merchante Grancolombiana, supra,* Northeast would use its expert advantage "to adopt preventive measures and thereby to reduce the likelihood of injury", *Italia Societa* v. *Oregon Stevedoring Co., supra,* 376 U.S., p. 324.

Northeast was primarily responsible for Lubrano's safety, *Marant* v. *Farrell Lines,* 550 F. 2d 142, 144 (3 Cir. 1977); *Munoz* v. *Flota Merchante Grancolombiana, supra,* and Northeast was solely responsible, *Bernardini* v. *Rederi*

A/B Saturnus, 512 F. 2d 660, 664, fn. 6 (2 Cir. 1975); *Brown* v. *Mitsubishi Shintaku Ginko,* 550 F. 2d 331, 333 (5 Cir. 1977), for obeying the mandatory "shall" requirement of the Safety and Health Regulations for Longshoring, 29 C.F.R. 1918.3(a), that "Slippery conditions shall be eliminated as they occur.", 29 C.F.R. 1918.91(c).

Because Northeast was solely in charge of stowing the cargo, and because of its warranty to Royal, and because of its expert and superior ability to avoid injuring its employee, and because of its primary responsibility for Lubrano's safety and sole obligation to obey the Longshoring Regulations, Northeast by its superintendent Spano and hatch boss Ashley should have ordered the holdmen to stop stowing the tallow drums until they got the additional dunnage which Royal had ordered*, *Nicroli* v. *Den Norske Africa,* 332 F. 2d 651, 655-656 (2 Cir. 1964); *Vaccaro* v. *Alcoa Steamship Co.,* 405 F. 2d 1133, 1138 (2 Cir. 1968); *Henry* v. *A/S Ocean,* 512 F. 2d 401, 406 (2 Cir. 1975), and Royal could not be held liable for negligent injury to Lubrano because a ship's officer did not endeavor to countermand Spano's and Ashley's orders to "Keep working, do the best you can", *Berti* v. *Compagnie de Navigation Cyprien Fabre,* 213 F. 2d 397, 399 (2 Cir. 1954); *Brown* v. *Mitsubishi Shintaku Ginko, supra,* 550 F. 2d, pp. 333-334; *Anuszewski* v. *Dynamic Mariners Corp.,* 391 F. Supp. 1143 (D. Md. 1975), aff'd 540 F. 2d 757 (4 Cir. 1976); *Antal* v. *Homerick Maritime,* 1976 A.M.C. 1272 (D.N.J. 1976).

Appellant relies primarily on *Napoli* v. *Hellenic Lines,* 536 F. 2d 505 (2 Cir. 1976), which Judge Haight multiply

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*A further inducement to stopping, as conceded on p. 16 of appellant's brief, was the detention pay to which the longshoremen would have been entitled while they waited for the dunnage.

distinguished (75a). *Napoli* did not fault the shipowner for not superfluously warning of an obvious known danger. *Napoli* held that:

> "* * * a charge which relieves a shipowner of liability for a dangerous condition which was 'known to the stevedore or any of its employees' is clearly inappropriate where the shipowner, itself, is the stevedore", 536 F. 2d, p. 508,

and that the shipowner has a duty to do more than merely warn of the obvious if the shipowner

> " * * * should reasonably have anticipated that [the injured longshoreman] would not be able to avoid the danger despite its obviousness", 536 F. 2d, p. 509.

Such anticipation can reasonably be inferred if the shipowner directly employs the longshoremen and therefore cannot rely on the safety warranty of an expert independent stevedore in sole charge of the work, with superior ability and primary responsibility to avoid injury to its own employees. Also, if there is no stevedore, then no knowledge can be imputed to the shipowner's longshore employee of dangerous conditions "known to the stevedore or any of its [other] employees". And if the longshoreman's bosses are also employees of the shipowner, the bosses are less likely to comply with the Longshoring Regulations at the expense and inconvenience of their employer, or order the work stopped until their employer rectifies dangerous conditions. Under those circumstances, the shipowner could reasonably anticipate that his exposed employee's "only alternatives would be to leave his job or face trouble for delaying the work", 536 F. 2d, p. 509.

When considering the evidence, Judge Haight properly took into account Ashley's uncontradicted, unimpeached testimony that he ordered his gang to "Keep working" because Spano had ordered him to do so (50a-51a), *Simblest* v. *Maynard,* 427 F. 2d 1, 5 (2 Cir. 1970), and the Judge fairly construed the testimony that "they said we had to wait" (41a-42a), "we had to wait until it came" (42a), "you had to wait until it arrived" (49a) as a suggestion by the ship's officer that the longshoremen stop working until the additional dunnage arrived (71a). Even if the Judge had failed to appreciate that "wait" meant "work", the uncontradicted evidence of who authoritatively could and did give the "Keep working" order would neutralize any such misapprehension.

In short, as Judge Haight commendably held (81a), no properly charged jury could reasonably infer that Royal was negligent because Royal should have foreseen that Lubrano would be unable to avoid the obvious danger for which he and the other holdmen had requested more dunnage. *Cf., Anuszewski* v. *Dynamic Mariners Corp., supra.**

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* As Judge Haight noted, there was insufficient evidence to support appellant's claim of negligent failure to anticipate need for additional dunnage and, even if such an inference were permissible, "its consequence was limited to the creation of an obvious hazard of which plaintiff was aware; and so we simply return to square one." (83a, fn. 3).

Conclusion

The judgment should be affirmed.

Respectfully submitted,

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July 7, 1977

3 copies Rec'd 7/8/77

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